

CONTRACT LITIGATION

I. INTRODUCTION.

II. THE CONTRACT PROCESS.

A. Formation vs. Performance. See page 10.

B. Authority.

1. Constitutional. As a sovereign entity, the United States has inherent authority to contract to discharge governmental duties. United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831). This authority to contract, however, is limited. Specifically, a government contract must:

- a. not be prohibited by law; and
- b. be an appropriate exercise of governmental powers and duties.

2. Statutory.

- a. Armed Services Procurement Act of 1947 (ASPA), 10 U.S.C. §§ 2301 - 2316.
- b. Annual DOD Authorization and Appropriation Acts.

3. Regulatory.

- a. Federal Acquisition Regulation (FAR).

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- b. Agency supplements (DFARS, AFARS).

III. DISTINGUISHING PROTESTS FROM DISPUTES.

- A. Protests. Contract Formation (at or prior to award).
- B. Disputes. Performance (after award).

IV. BID PROTESTS.

- A. Agency. FAR 33.103; Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995).
 - 1. Army Material Command (AMC).
 - 2. Army Training and Doctrine Command (TRADOC).
 - 3. National Guard Bureau (NGB).
- B. General Accounting Office (GAO).
 - 1. Jurisdiction.
 - a. The Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-56.
 - b. Protester must show:
 - (1) Interested party status.
 - (2) Timeliness.

(3) Agency violation of procurement statute or regulation, arbitrary or capricious action, or abuse of discretion.

(4) Prejudice.

2. Rules.

a. 4 C.F.R. Part 21.

b. <http://www.gao.gov/decisions/bidpro/new.reg/highlite.htm>.

3. Process.

a. Protester submits protest in writing.

b. GAO notice/protective orders.

c. Agency's corrective action (ends protest) or administrative report.

d. Protester and Intervenor Comments.

e. Hearing (in selected cases).

f. Decision.

(1) Within 100 days of protest filing.

(2) Express option. Within 65 days.

g. Request for reconsideration.

h. Remedies.

(1) If GAO “sustains” a protest, it then recommends agency actions:

(a) Issue new solicitation;

(b) Terminate contract;

(c) Recompete contract;

(d) Payment of reasonable attorneys’ fees and costs and/or bid or proposal preparation.

(2) Agencies generally follow GAO’s recommendations.

C. U.S. Court of Federal Claims (COFC).

1. Jurisdiction.

a. Tucker Act. 28 U.S.C. § 1491(b).

b. Administrative Dispute Resolution Act (ADRA) of 1996.

2. Process

a. General Order No. 38.

b. TROs and Preliminary injunctions.

c. Review conducted under Administrative Procedures Act.

d. Administrative record.

- e. Limited discovery.
- f. Hearings.
- g. Post-hearing Briefs.

D. District Courts.

- 1. Jurisdiction. Does it still exist?
 - a. Administrative Procedure Act under Scanwell.
 - b. Administrative Dispute Resolution Act of 1996.
 - (1) Subsume Scanwell?
 - (2) ADRA sunset Jan 1, 2001.
- 2. Procedures are those generally followed in civil litigation.

V. CONTRACT DISPUTES.

A. Armed Services Board of Contract Appeals (ASBCA).

- 1. Jurisdiction.
 - a. Contract Disputes Act of 1978 (41 U.S.C. §§ 601-13).
 - b. ASBCA Charter – broader than CDA.
- 2. Remedies.
 - a. Monetary.

- b. Nonmonetary.
 - (1) Contract terminations.
 - (2) Rights in property.
 - (3) Compliance with cost accounting standards.
- 3. Personnel.
 - a. Army represented by trial attorneys with the Contract Appeals Division.
 - b. Contractor represented by officers of the business entity or counsel.
 - c. One Board judge assigned to the case; three judges involved in a decision.
- 4. Process. See page 9.
 - a. Timeline can be normal, expedited (\$50,000 or less-decision w/in 120 days), accelerated (\$100,000 or less-decision w/in 180 days).
 - b. Before appeal there must be a proper claim and a Contracting Officer's Final Decision
 - c. Rules. See <<http://www.law.gwu.edu/asbca>>.
 - (1) Notice of Appeal.
 - (2) Pleadings/Agency Rule 4 File.
 - (3) Discovery.

(4) Hearing (supplement the fact record).

(5) Briefs (proposed facts and argument).

B. U.S. Court of Federal Claims.

1. Jurisdiction.

a. Tucker Act. 28 U.S.C. § 1491(a)(1).

b. Contract Disputes Act of 1978. 28 U.S.C. § 1491(a)(2).

2. Remedies.

a. Monetary.

b. Nonmonetary.

(1) Contract terminations.

(2) Rights in property.

(3) Compliance with cost accounting standards.

3. Personnel.

a. Army represented by attorneys with the DOJ and Army Litigation Division.

b. Contractor represented by counsel.

c. One judge.

4. Process. See <<http://www.law.gwu.edu/fedcl/>>.
 - a. Rules. See Rules of the Court of Federal Claims (RCFC).
 - b. Pleadings/DOJ Call letter/Agency Litigation Report.
 - c. Discovery.
 - d. Trial.

VI. APPELLATE AUTHORITY.

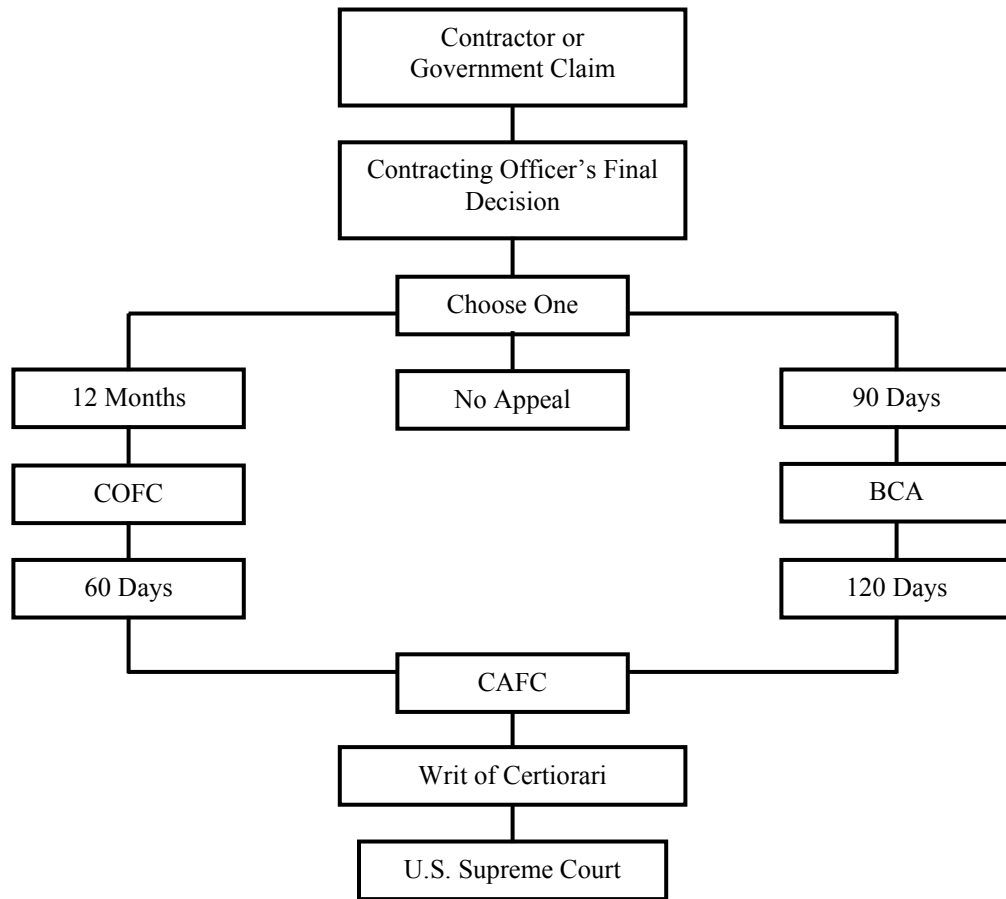
- A. U.S. Court of Appeals for the Federal Circuit (CAFC) (except for admiralty cases decided at ASBCA-appeal to U.S. District Court).
- B. U.S. Supreme Court.

VII. RESOURCES

- A. TJAGSA Course Materials.
 1. Click on “Publications” at www.jagenet.army.mil/TJAGSA.
 2. Contract Attorneys Course.
- B. Contract Litigation Course- held in March of even years.
- C. LEXIS: Public Contracts Decisions from Comptroller General, BCAs, All Federal Courts.

VIII. CONCLUSION.

The Disputes Process



The Contracting Process

